1. What is the weight of the Searsport Comprehensive Plan in the absence of a land use ordinance; what deference must the State give to the town's comp plan?

There appear to be two provisions:

A) That state growth related capital investments (as defined at 30-A MRSA section 4301(5-B)) are limited to the growth areas (or surrogates) identified in 4349-A(1) below, unless one of the exceptions in 4349-A(1) C. applies.

B) That preference must be given when locating state facilities, to (among other things) growth areas designated in a consistent local comprehensive land use plan, as provided in 30-A MRSA section 4349-A(2).

§4349-A. State capital investments

1. Growth-related capital investments. The State may make growth-related capital investments only in: [2003, c. 641, §16 (amd).]

A. A locally designated growth area, as identified in a comprehensive plan adopted pursuant to and consistent with the procedures, goals and guidelines of this subchapter or as identified in a growth management program certified under section 4347-A;

[2003, c. 641, §16 (amd).]

B. In the absence of a consistent comprehensive plan, an area served by a public sewer system that has the capacity for the growth-related project, an area identified in the latest Federal Decennial Census as a census-designated place or a compact area of an urban compact municipality as defined by Title 23, section 754; or

[1999, c. 776, §10 (new).]

C. Areas other than those described in paragraph A or B for the following projects:

(1) A project certified to the Land and Water Resources Council established in Title 5, section 3331 by the head of the agency funding the project as necessary to remedy a threat to public health or safety or to comply with environmental clean-up laws;

(2) A project related to a commercial or industrial activity that, due to its operational or physical characteristics, typically is located away from other development, such as an activity that relies on a particular natural resource for its operation;

(3) An airport, port or railroad or industry that must be proximate to an airport, a port or a railroad line or terminal;

(4) A pollution control facility;

(5) A project that maintains, expands or promotes a tourist or cultural facility that is required to be proximate to a specific historic, natural or cultural resource or a building or improvement that is related to and required to be proximate to land acquired for a park, conservation, open space or public access or to an agricultural, conservation or historic easement;

(6) A project located in a municipality that has none of the geographic areas described in paragraph A or B and that prior to January 1, 2000 formally requested but had not received from the office funds to assist with the preparation of a comprehensive plan or that received funds to assist with the preparation of a comprehensive plan within the previous 2 years. This exception expires for a municipality 2 years after such funds are received;

(7) A housing project serving the following: individuals with mental illness, mental retardation, developmental disabilities, physical disabilities, brain injuries, substance abuse problems or a human immunodeficiency virus; homeless individuals; victims of domestic violence; foster

children; or children or adults in the custody of the State. A nursing home is not considered a housing project under this paragraph; or

(8) A project certified to the Land and Water Resources Council established in Title 5, section 3331 by the head of the agency funding the project as having no feasible location within an area described in paragraph A or B if, by majority vote of all members, the Land and Water Resources Council finds that extraordinary circumstances or the unique needs of the agency require state funds for the project. The members of the Land and Water Resources Council may not delegate their authority under this subparagraph to the staffs of their member agencies.

[2001, c. 613, §2 (amd).]

2. State facilities. The Department of Administrative and Financial Services, Bureau of General Services shall develop site selection criteria for state office buildings, state courts, hospitals and other quasi-public facilities and other civic buildings that serve public clients and customers, whether owned or leased by the State, that give preference to the priority locations identified in this subsection while ensuring safe, healthy, appropriate work space for employees and clients and accounting for agency requirements. On-site parking may only be required if it is necessary to meet critical program needs and to ensure reasonable access for agency clients and persons with disabilities. Employee parking that is within reasonable walking distance may be located off site. If there is a change in employee parking from on-site parking to off-site parking, the Department of Administrative and Financial Services must consult with the duly authorized bargaining agent or agents of the employees. Preference must be given to priority locations in the following order: service center downtowns, service center growth areas and downtowns and growth areas in other than service center communities. If no suitable priority location exists or if the priority location would impose an undue financial hardship on the occupant or is not within a reasonable distance of the clients and customers served, the facility must be located in accordance with subsection 1. The following state facilities are exempt from this subsection: a state liquor store; a lease of less than 500 square feet; and a lease with a tenure of less than one year, including renewals. [2003, c. 510, Pt. A, §28 (rpr).]

4. Application. Subsections 1 and 2 apply to a state capital investment for which an application is accepted as complete by the state agency funding the project after January 1, 2001 or which is initiated with the Department of Administrative and Financial Services, Bureau of General Services by a state agency after January 1, 2001. [1999, c. 776, §10 (new).]

2. What authority does the town have over proposals for Sears Island? Does that change depending on who makes the proposal?

It depends on who proposes the development or use. A non-state applicant must comply with zoning, unless the applicant obtains a declaration from a court finding the zoning void as applied to the applicant because the zoning is inconsistent with the consistent comprehensive plan and the grace period for getting consistent is past. Existing town authority over land use activities on Sears Island arises out of authority adopted by the town through its land use ordinances. Typically this would include, regardless of whether or not the town had a comprehensive plan, mandatory shoreland zoning, and floodplain regulations if the town participates in the NFIP; also plumbing (local permit, state regulation) and building codes (if locally adopted). Land use authorities that must be consistent with and contingent on having a comprehensive plan include zoning (other than mandatory shoreland zoning), impact fee and rate of growth ordinances.

Zoning is advisory to the state unless a town's plan and zoning ordinance have been reviewed by the state and found consistent, in which case, the state shall comply with the local zoning except as otherwise provided in law (below).

§4352. Zoning ordinances…….

6. Effect on State. A zoning ordinance that is not consistent with a comprehensive plan that is consistent with the provisions of section 4326 is advisory with respect to the State. Except as provided in this section, a state agency shall comply with a zoning ordinance consistent with a comprehensive plan that is consistent with the provisions of section 4326 in seeking to develop any building, parking facility or other publicly owned structure. The Governor or the Governor's designee may, after public notice and opportunity for public comment, including written notice to the municipal officers, waive any use restrictions in those ordinances upon finding that:

A. The proposed use is not allowed anywhere in the municipality;

[1993, c. 721, Pt. A, §11 (new); Pt. H, §1 (aff).]

B. There are no reasonable alternative sites for or configurations of the project within the municipality that would achieve the necessary public purposes;

[1993, c. 721, Pt. A, §11 (new); Pt. H, §1 (aff).]

C. There are no reasonable alternatives to the project, including sites in other municipalities, that would achieve the necessary public purposes;

[1993, c. 721, Pt. A, §11 (new); Pt. H, §1 (aff).]

D. The project will result in public benefits beyond the limits of the municipality, including without limitation, access to public waters or publicly owned lands; and

[1993, c. 721, Pt. A, §11 (new); Pt. H, §1 (aff).]

E. The project is necessary to protect the public health, welfare or environment.

[1993, c. 721, Pt. A, §11 (new); Pt. H, §1 (aff).]

A decision to waive a restriction under this section may be appealed by the municipality or any aggrieved party to Superior Court. [2003, c. 688, Pt. C, §20 (amd).]

3. What is the legal differentiation between commercial, industrial and transportation uses in Searsport's comp plan?

We are unable to make this determination at the state level. Since this is a local plan, this differentiation must be made at the local level…perhaps by the planning board in consultation with the code officer and municipal attorney. However, if issues involving shoreland zoning arise, DEP's Shoreland Zoning Unit may wish to have some input regarding the interpretation of a particular ordinance provision if it is based on the state's shoreland zoning minimum guidelines. To the extent that these terms may be applied by the town in administering other state or federal standards, such as floodplain management, plumbing code, etc. those programs may also wish to have some input in differentiation of these uses.

Submitted by John DelVecchio
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